

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS & ST. JOHN

FLORA NICHOLAS and PAUL GAYTER,
in their own right and as next
friend of S.G.,

Plaintiffs,

v.

WYNDHAM INTERNATIONAL, INC.,
WYNDHAM MANAGEMENT CORP., SUGAR
BAY CLUB and RESORT, CORP., RICK
BLYTH and BRYAN HORNBY,

Defendants

CIVIL NO. 2001/147-M/R

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ORDER ON HORNBY'S MOTION TO COMPEL
(FILED FEBRUARY 27, 2003)

Hornby filed a Motion to Compel regarding Plaintiffs' privilege log. By Order dated April 9, 2003, the Court directed that Plaintiffs file a revised privilege log; that the parties file further pleadings with regard thereto; and that Plaintiffs provide copies of the contested documents for *in camera* review. All such pleadings have been filed and Plaintiffs have delivered the subject documents for my review.

The April 9, 2003 Order provided that Hornby shall serve and file a statement indicating the particular entries on Plaintiffs' (supplemental) privilege log that Hornby contests and stating the

particular reasons therefor. Further to such Order, Hornby filed a statement of objections to Plaintiffs' supplemental privilege log. Hornby states therein the following objections:

- A. Plaintiffs' wholesale redaction of "headers" reflecting the identities of the sender and recipient is improper. "The senders and recipients' identities in no way reveal any substantive confidential information."
- B. Plaintiffs have failed to demonstrate that they have not waived the attorney-client privilege or work-product doctrine. Plaintiffs argue without citation that "...it is well settled that disclosure of privileged information to a third party waives such privilege. Further it is Plaintiffs' burden to demonstrate not only privilege, but that they have not waived any privilege." Hornby then lists particular documents that he contends must be fully disclosed for such reason. (GAY 105, 107, 111, 119-20), 127, 130, 140-42, 314, 343-44, 345-47, 389-390).
- C. Plaintiffs waived any attorney-client privilege and/or protection under the work-product doctrine by providing e-mails in which they and (V.I.) Assistant Attorney (General) Douglas Dick were either the

author(s)/sender(s) and/or recipients which were disclosed to third parties. Hornby cited a letter dated February 8, 2001 from the Gayters to Emily Disanto in which they state, "you will also find enclosed all the relevant e-mails that have gone back and forwards about this case-largely between us and Douglas Dick, the criminal prosecuting attorney." Hornby asserts that such letter "...undeniably establishes that Plaintiffs waived any privilege or protection concerning the following documents. (GAY 37, 45-46, 56, 59, 63, 71, 76-77, 78, 84-85, 87-88, 89, 91, 94, 97, 107, 362-371). Hornby contends that Plaintiffs also disclosed copies of e-mail correspondence between Attorney Dick and Scott Votey, Headmaster at the Green Hedges School and Hornby is entitled to documents number GAY 326-333.

As per the Order dated April 9, 2003, Plaintiffs filed a response to Hornby's statement of objection to Plaintiffs' supplemental privilege log. Plaintiffs argue that Hornby's prior pleading was served and filed beyond the deadline imposed by the Court and accordingly Hornby's objections should be deemed waived. That argument will be disregarded and the matter will be

addressed on the merits.

Plaintiffs respond to Hornby's contentions as follows:

- A. Hornby's Demand for Disclosure of irrelevant e-mail headers is unreasonable and intended to harass Plaintiffs. "As Plaintiffs stated in their Notice of Filing Plaintiffs' Supplemental Privilege Log filed on April 16, 2003, these headers reflect no substance and are obviously irrelevant. ...[a]s Plaintiffs have repeatedly represented in good faith to Hornby's counsel, these headers do not reveal any relevant information-period...."
- B. The burden of establishing waiver of asserted work-product protections belongs to the party seeking disclosure rather than the party asserting the protection (with authority cited).
- C. 1. A party does not waive work production protection over documents that include or are provided to third parties who share a common interest with the party (with authority cited) "...Plaintiffs did not waive any work protection by sharing and exchanging information with the finite group of individuals serving as Plaintiffs' support network

during preparation for the criminal trial of Hornby. All of the persons who were copied on the contested e-mails, including employees of the National Center for Missing and Exploited Children ("NCMEC"), the nurses that conducted S.G.'s physical examination after her molestation, Attorney Douglas Dick-who prosecuted Hornby, and S.G.'s treating counselor, were part of a contained group of trusted acquaintances who had a 'common interest' in the prosecution of Hornby..."

2. Hornby has failed to meet his burden of establishing which, if any, of the documents listed on Plaintiffs' supplemental privilege log were provided to Emily Disanto, "...The letter, the only thing Hornby refers to in support of his argument, does not identify which e-mails were provided to Ms. Disanto...Hornby, however, has made no attempt to identify which e-mails were provided to Ms. Disanto, let alone verify that these e-mails are the same e-mails that Plaintiffs have listed on their supplemental privilege log."

I. Work Product Protection from Previous Related Matters

The work product doctrine provides protection for materials prepared by an attorney or his or her agent in anticipation of litigation, for use in trial. The purpose of the work-product doctrine is to encourage careful and thorough preparation for litigation by a party's attorney. *U.S. v. Ernstoff*, 183 F.R.D. 148, 153 (D.N.J. 1998) [citing *Hickman v. Taylor*, 329 U.S. 495 (1947) and other cases].

The Supreme Court has stated that work product remains protected even after the termination of the litigation for which it was prepared. *Grolier, Inc. v. FTC* 462 U.S. 19, 25 (1983). Most courts adhere to this concept and have ruled that the work product doctrine does extend to subsequent litigation. The rationale is that Rule 26 Fed. R. Civ. P., which governs discovery, does not explicitly confine the privilege to the litigation in which it is sought. *Fontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 703 (10th Cir. 1998).

In *In re: Grand Jury Proceedings*, 604 F.2d 798, 803-04 (3d Cir. 1979), the Third Circuit stated, *in dicta*, that the doctrine should only apply to subsequent litigation which is closely related. In that case, the Court held that all documents produced in connection with an administrative proceeding were

subject to work product privilege even though they may not have been specifically prepared in connection with the subsequent grand jury investigation in which they were sought. See also *Wood v. McCown*, 784 S.W. 2d 126, 129 (Ct. App. Tx 1990 [work product protection endures beyond a concluded criminal case. Materials prepared in criminal cases are not subject to disclosure in subsequent civil proceedings].

II. Waiver of Work Product Protection by Prior Disclosure¹

The question of when disclosure to one person should thereafter require disclosure to another is more complex in the context of work-product protection than it is in the context of attorney-client privilege. The predicate of the inquiry in the work-product context is not, as it is in the attorney-client context whether the material was disclosed, but whether the material was disclosed to an adversary.

United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980). The work-product privilege "does not exist to protect a confidential relationship, but rather to promote *the adversary system by safeguarding the fruits of an attorney's* trial preparations from the discovery attempts of the opponent. The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation...We conclude, then

1. Text adapted from Epstein, Edna Selan, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE, 4th ed. (2001), pp. 612-613

that while the mere showing of voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege.

Thus, inadvertent or even intentional disclosure of work-product documents will not necessarily constitute waiver to all such documents.

Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222, (4th Cir. 1976). "We...are of the opinion that broad concepts of the subject matter waiver analgous to those applicable to claims of attorney-client privilege are inappropriate when applied to Rule 26(b)(3).

In Re: F.A. Potts & Co., Inc. 30 Bankr. 708, 711-12 (E.D.Pa. 1983). When a letter was written in anticipation of litigation, the mere fact that it was disclosed to an "unrelated third party" did not constitute waiver because the purpose of the doctrine is to protect material from adversaries and not necessarily from the rest of the world. Waiver occurs only if disclosure to a third party substantially increases the possibility that an adversary could get the information.

The essential question with respect to waiver of the work-product doctrine by disclosure is whether the material has been kept away from adversaries. Thus, the protection is retained when there has been disclosure to persons with a common interest, to persons in the course of a business relationship, and to the government. In all cases, the focus of the inquiry is on the extent to which the relationship is an adversarial one and the efforts made to keep adversaries from obtaining material.

As stated in *United States v. American Tel. & Tel. Co.*,

supra,

...Waiver would occur...only if the disclosure 'substantially increases' the possibility of an opposing party obtaining the information...; See also; *Hatco Corp. v. W.R. Grace & Co.*, 1991 WL 83126 at *7 (D.N.J. 1991). The work product doctrine protects information from opposing parties, rather than from all others outside a particular confidential relationship... A showing of disclosure to a third party does not result in a waiver of the work product protection if the parties have common interests.

III. Burden of Establishing Waiver

The party asserting waiver of work product immunity rather than the party asserting the work product protection has the burden of establishing waiver.

Greene, Tweed of Delaware, Inc. v. DuPont Dow Elastomers, LLC., 202 F.R.D. 418, 423 (E.D.Pa. 2001); *Hatco Corp. v. W.R. Grace & Co.*, *supra*.

IV. Attorney-Client Privilege

The purpose of the attorney-client privilege is:

...to encourage full and frank communication between the attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

Upjohn Co. v. United States, 101 S.Ct. 677, 682; see also *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*, 32 F.3d 851, 862 (3d Cir. 1994); *In Re: Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979).

No bright-line rule governs the applicability of the attorney-client privilege. Rather, the courts should determine the applicability of the privilege on a case-by-case basis. *Id* at 686 (See complete discussion in *Harding v. Dana Transport, Inc.* 914 F.Supp. 1084, 1090-1091 (D.N.J. 1996)).

The attorney-client privilege may be waived by disclosure to other persons. F.R.E. 501, 5 V.I.C. § 854, 864. *U.S. v. El Paso Co.*, 682 F.2d 530, 539-41 (5th Cir. 1982) *cert. den.* 104 S.Ct. 1927 (1984).

V. Conclusion

Plaintiffs have presented no authority for their redaction of "headers" from documents produced and concede that such headers "...reflect no substance and are obviously irrelevant." Accordingly, there is no reason not to produce all such information to Hornby (see list at paragraph 1 of Notice of Filing Plaintiffs' Supplemental Privilege Log).

Upon consideration of Hornby's Statement of Objections to Plaintiffs' privilege log, Plaintiffs' response thereto and the principals enunciated above, and upon review of the subject documents, the Court finds that it is Hornby's burden to demonstrate that Plaintiffs have waived their asserted privileges; that Hornby has not sustained such burden; and that

Plaintiffs have not waived any privileges by their disclosures to persons with a common interest. Further, Hornby has not shown which, if any, of the documents listed on Plaintiffs' supplemental privilege log were provided to Emelia Disanto. In any event, it is apparent from Exhibit "A" to Hornby's Statement of Objection that Ms. Disanto was part of Plaintiffs' common interest group and any disclosure to her was not to any adversary as discussed above.

Regarding those documents listed under "B" of Hornby's Statement of Objection to Plaintiffs' privilege log, the Court finds as follows:

1. Plaintiffs need not produce GAY numbers 105 and 111.
2. Plaintiffs need not produce the redacted portions of GAY numbers 199, 127, 103 (except for "header" and signature), 140, 314 (except for signature), 343 and 344. (GAY Nos. 120, 141, and 142 did not contain any apparent redactions).
3. The un-redacted versions of GAY nos. 107, 389; the redacted version of GAY 390; and both versions of GAY no. 315 have not been provided for review. To the extent the only deletions therefrom are headers or dates, they should be produced to Hornby. Otherwise,

they must be produced for *in camera* review.

Regarding those documents listed at "C" of Hornby's Statement of Objections to Plaintiffs' supplemental privilege log, the Court finds as follows:

1. Plaintiffs need not produce GAY number 37, 45-46.
2. Plaintiffs must produce the redacted portions of GAY no. 56.
3. Regarding GAY number 76-77 and 84-85, Plaintiffs must produce only the above line headers (76 & 84) and the dates (76-77, 84-85).
4. Regarding GAY numbers 362-371, Plaintiffs need not produce the redacted portions (There are no apparent redactions in 367-371).
5. Regarding GAY number 326-333, Plaintiffs need not produce the redacted page 329. (There are no other apparent redactions).
6. Regarding GAY numbers 56, 59, 71, 78, 87-88, 89, 91, 94, 97, 107 the redacted versions have not been provided for review. To the extent the only deletions therefrom are "headers" or dates, they should be produced to Hornby. Otherwise, they must be produced for *in camera* review.

Accordingly, it is hereby;

ORDERED as follows:

1. Plaintiffs shall produce copies of all documents or portions thereof that the Court found need be produced within ten (10) days of the date of this Order.
2. Plaintiffs shall produce copies of any documents that were not produced for my review (that are in issue pursuant to the findings above) for further *in camera* review by May 30, 2003.

ENTER:

Dated: May 19, 2003

_____/s/_____
JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
WILFREDO MORALES
Clerk of Court

By: _____
Deputy Clerk